LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
SEP 16 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 295

ASSOCIATION OF LITHUANIAN WORKERS AND AMERICAN LITHUANIAN WORKERS LITERARY ASSOCIATION, INC., *Petitioners,*

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION

JOSEPH FORER
DAVID REIN
Attorneys for Petitioners

NATHAN WITT
Attorney for Association of Lithuanian Workers

I. G. NEEDLEMAN
Attorney for American Lithuanian Literary Association

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 295

ASSOCIATION OF LITHUANIAN WORKERS AND AMERICAN LITHUANIAN WORKERS LITERARY ASSOCIATION, INC., *Petitioners,*

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION

I.

In our petition we contended that the Attorney General denied petitioners an administrative remedy by conditioning opportunity to contest the proposed designation on their answering interrogatories which he had no legal right to ask and which were impossible to answer. We pointed out that when petitioners protested the interrogatories and the spurious administrative procedure, the Attorney General defaulted them

without a hearing and without even answering their objections.

Respondent's Opposition does not contend that the Attorney General had a right to ask the interrogatories or that they could be answered. Unable to defend the interrogatories, the Opposition argues that petitioners may not complain about them because petitioners' objections to the Attorney General were not in proper form. Thus the Opposition alleges that the two communications of the Workers Association which protested the interrogatories—the officers' letter of September 8, 1953 (W. R. 39-41) and counsel's letter of October 4, 1953 (W. R. 42-43)—had the following defects. (1) The officers' letter was not verified, a fact which "alone would have been sufficient grounds for refusing to treat it as a reply" (Opp. 19). This statement is made despite the fact that the officers' letter was, of course, not intended or claimed to be a reply to the interrogatories, but rather a statement of objections to the interrogatories and to the Attorney General's procedures. (2) Though the officers' letter was timely, having been filed within the time permitted to answer the interrogatories (Opp. 18); it was not sufficiently specific and clear to constitute a protest which had to be passed upon (Opp. 18-19). (3) On the other hand, counsel's letter was sufficiently specific and clear, but it did not have to be passed upon either because it was not timely and was not signed by the officers (Opp. 17). This statement is made despite the fact that counsel's letter was sent about four months before the designation was made and though the Attorney General never answered the officers' letter.

With regard to the claim that the officers' letter was not sufficiently clear to constitute a protest against the

interrogatories, the Opposition recognizes that the letter "complained generally that the interrogatories were impossible to answer,* and attacked the Rules and hearing procedures as unconstitutional" (Opp. 19). "But," the Opposition continues, "it did not ask that any or all of the interrogatories be modified or withdrawn; it did not request a hearing on either the question of designation or the merits of its objections; nor did it ask the Attorney General to give any consideration whatsoever to its objections." The theory seems to be that the Workers Association was delinquent for not presenting its objections in accordance with some unspecified formal requirements. But the letters clearly indicated that the organization wanted its objections considered and the interrogatories withdrawn. Nor is it possible to see why well-founded objections may be disregarded because a hearing was not requested—particularly since the Attorney General's regulations prohibit a hearing, and even the asking of one, unless his interrogatories are answered without objection.

The criticisms made of the Workers Associations' objections rest on and seek to propagate the erroneous premise that the Attorney General's regulations specify requirements of time, verification, signature, specificity, and other matters of form, for the making of objections to interrogatories, and that petitioners were correctly defaulted because they did not comply with these requirements. The truth is, however, that the Attorney General's regulations make no requirements governing the form of objections. On the contrary,

* Of course the objection on this score was very specific (W. R. 40-41).

they do not contemplate, and actually prohibit on pain of default, the making of objections. Section 41.3 states: "The reply shall answer *each* interrogatory *completely and with particularity* and *shall be limited to statements of fact.*" And section 41.4 provides that a hearing may not even be requested unless *such a reply* ("a reply as provided in this part") is filed.

The facts therefore contradict the government's protestation (Opp. 17) that if only the organization had made its objections in accordance with (non-existent) formal requirements, it would not have been defaulted for failing to answer the interrogatories. In view of the nature of the interrogatories and the fact that the regulations prohibit objections, the organization would not have waived its right to complain of the interrogatories even if it had not protested them. In fact, however, here the organization protested, not once but twice, specifically and generally, clearly and vigorously, and its protests were well-founded. The Attorney General nevertheless defaulted it for failing to answer the illegal and impossible inquisition, and this inexcusable action was in conformity with his inexcusable regulations. This case therefore squarely presents the question of whether the Attorney General may lawfully designate an organization which he has by artifice denied a hearing.*

---

* The Opposition's criticism of the response of the Literary Association is that it did not object to the interrogatories with sufficient specificity (Opp. 20). The response, however, objected that the Attorney General had no power to inquire into the organization's writings and publications (thus raising an objection to Interrogatories 20, 21, 22, 31, 36, 38) and that the Literary Association never inquired into the politics of its members (thus objecting to Interrogatories 2, 3, 6, 7, 8, 10, 12, 13, 14, 15, 16, 17, 18, 19, 27, 36). See L. R. 30-31, 18-29.

II.

Since petitioners were denied an administrative remedy, they are not precluded by the doctrine of exhaustion from raising all possible objections to their designation by the Attorney General. But even if they had rejected the administrative remedy, as the Opposition erroneously claims, nevertheless, having been designated, they are entitled to challenge the power of the Attorney General to designate organizations. As our petition shows (p. 29), this appears from principle and from this Court's decision in *Cole* v. *Young*. The Opposition's position to the contrary (pp. 15-16) rests on an uncritical assimilation of several exhaustion situations. The most the Opposition's authorities demonstrate is the following: (1) Before the final administrative order is entered, the doctrine of exhaustion may preclude even a challenge to power in an action brought to enjoin an administrative hearing or potential administrative action. (2) After the administrative order is entered, one who rejected an administrative remedy may be precluded from litigating the *correctness* of the administrative findings and order. Neither of these two types of rulings precludes a challenge *to power after the administrative process has concluded* even if the aggrieved party rejected a proffered administrative remedy. In that situation, the party may litigate the administrative body's overruling of his demurrer to its authority. This is the holding of *Cole* v. *Young*, which respondent ignores.

Under any circumstances, therefore, this case presents the important question, not yet resolved by this Court, as to whether the Attorney General has the constitutional power to destroy organizations by de-

famatory designations. We cannot take seriously respondent's contention (Opp. 21-22) that the Court "implicitly" and more or less accidentally decided this important and serious matter in the *Anti-Fascist, Adler* and *Wieman* cases.

III.

Respondent is also guilty of an inaccuracy in stating (Opp. 15, 20) that the court below ruled that it need not decide whether the claimed designation power was constitutional. The court below by-passed this question stating that even assuming that the question could be raised after designation, despite failure to exhaust administrative remedies, the claimed power to designate was valid (Petition, p. 11a). In any event, even if the government were right as to the holding of the court below, the issue as to whether one can challenge the lack of constitutional power, without first exhausting administrative remedies, is an important one which requires resolution by this Court.

Respectfully submitted,

JOSEPH FORER
DAVID REIN
Attorneys for Petitioners

NATHAN WITT
Attorney for Association of Lithuanian Workers

I. G. NEEDLEMAN
Attorney for American Lithuanian Literary Association